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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR,

Appellant.

versus

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER,

Appellees.

SUPPLEMENTAL BRIEF FOR APPELLANT.

EUGENE STANLEY,
Attorney General;
HARRY V. BOOTH,
LEONARD L. LOCKARD,
Counsel for Appellant.

BOOTH & LOCKARD,
Of Counsel.

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SUPPLEMENTAL BRIEF FOR APPELLANT.

New arguments or variations of old arguments have been tendered in Appellee's brief—hence, this supplemental brief on our behalf.

APPELLEES' MAIN CASES.

Appellees rely in the main on *Nichols v. Coolidge*, 274 U. S. 531, and *Hoeper v. Tax Commission*, 284 U. S. 206. In our opinion, these cases are not apposite.

In the *Hoeper* case, the Court had before it an income tax of the State of Wisconsin, which required a joint return by husband and wife, regardless of the origin or

source of the income. The wife in the case had separate property in which the husband had no interest. Said the Court:

> "He never had any title to it or control of any part of it."

There is far distance from the situation in Louisiana as relates to the community property. The husband in Louisiana has not only title, but he has control. In Wisconsin, this separate property of his wife was as remote from the husband as if it belonged to a total stranger.

In the case of *Nichols v. Coolidge*, the grantor had made an absolute deed to his children, reserving the property to himself under a rental arrangement. The grantees had an absolute right at any time to terminate this rental arrangement. The grantor had no reserved right paramount to the will of the grantees. Said the Court, speaking of the grantees:

> "They had a right to sell the property subject to the lease and had all rights incident to ownership."

The Court could have added that they had a right to terminate the lease.

As defined by the *Tyler* and *Jacobs* cases and the laws of Louisiana, we have undertaken hereinbelow to graph in juxtaposition the relative rights of the tenant by the entirety and of joint tenancy as to their interest in the tenancies prior to death as compared with the rights and interest of the wife in community property in Louisiana prior to death. This graph does not purport to be

inclusive of all the distinctions but serves to illustrate broadly the point over which we labor.

Right of Tenant by entirety in property prior to death	Right of Joint tenant in property prior to death	Right of wife in community property prior to death
Title? Yes	Title? Yes	Title? No
Possession? Yes	Possession? Yes	Possession? No
Fruits? Yes	Fruits? Yes	Fruits? No
Alienation? No	Alienation? Yes	Alienation? No
Conservation? Yes	Conservation? Yes	Conservation? Yes—Limited
Testamentary Disposition? No	Testamentary Disposition? No	Testamentary Disposition? Yes

It will thus be seen that of all of these six mentioned privileges connected with ownership, in the case of a tenant by the entirety, death creates only two rights—namely, the right to alienate and the right of testamentary disposition; that in the case of a joint tenant, death creates only one right—namely, the right of testamentary disposition; and that in the case of the wife in Louisiana, death creates four rights—namely, title, possession, fruits and the right to alienate.

IS THE WIFE'S ONE-HALF SUBJECT TO THE PAYMENT OF THE TAX?

Counsel for Appellees inveigh against the Act on the grounds that while it draws the wife's moiety into the taxable estate for the purpose of assessing the tax, such portion is not in the estate for the purpose of paying the tax. Is this position tenable?

It is the intent of the Act that the tax shall be paid before the distribution of the estate. It is made the duty

of the Executor throughout the Act to ascertain the tax and he is made personally liable therefor. (26 U. S. C. A., Section 825). In Louisiana the wife's share of community property is taken possession of and administered with the other property of the husband's in the husband's succession. (*Succession of Bertrand*, 123 La. 784, 49 So. 524; *Kremer v. Kremer*, 121 La. 484, 46 So. 600; *Fontenot v. Fontenot*, 157 La. 511, 102 So. 590; *Kelly v. Kelly*, 198 La. 338, 3 So. 2nd, 641). So in this case had there been an administration, the embattled wife's share would have been taken by decedent's executor and administered because the wife's interest in community property is residual only.

The Act contemplates payment by the Executor out of property in his hands, and the wife's property is in the hands of the Executor where there is an administration.

But the counsel contends that the Executor would not be permitted to pay it out of the wife's one-half. But by what law would he be prohibited? He is directed by Federal law to pay it out of funds in his possession and therefore, if he is denied making such disposition of the wife's property it is by virtue of state law and so the Federal Act has not fathered any injustice, if injustice it be.

In the case of *Riggs v. Del Drago* (October Term, 1943), this Court held that the Federal Act is not concerned with the ultimate thrust of the Federal Estate Tax and does not undertake to designate the persons who will finally bear the impact of the tax. This is a matter of local law. So if the matter eventuates, as appellees urge,

they have been victimized by State law, not the Federal law.

Moreover, Section 827 (b), Title 26, U. S. C. A. imposes personal liability for the tax on the spouse to the extent of property taken by her, but the counsel seeks to get around this provision of the law, by the argument that Section 826 (b) requires a return to the spouse who might be called on to pay this tax. That provision is inserted to provide for the situation where the estate is distributed before payment of the tax and the tax is taken from one distributee or more. In this case, the distributee making payment can enforce contribution from the others. See *Riggs v. Del Drago, supra*, for a discussion of this section.

It is true that Section 826 (a), Title 26, U. S. C. A. provides that proceedings can be taken in the event the tax is not paid against "property of the decedent", but this means property of the decedent as found by the Federal law. Under the Federal Tax law the estate of the decedent for taxable purposes, includes the community property held by him with the surviving spouse.

IS THE ACT APPLICABLE IF THE WIFE PREDECEASES THE HUSBAND?

Complaint is made that the Act manifestly cannot constitutionally stand in the event that the wife predeceases the husband. This happens two out of seven times in the United States.(1) This contention comes too late. It was not raised in the pleadings below. Certainly, grave constitutional questions should not be determined

(1) Fifteenth Census of the United States, Population, Vol. 2, p. 849, showing for 1930, 613,842 widows to 195,860 widowers among the white population.

except where the issue is squarely raised in the pleadings and the Court has benefit of full argument upon both sides. See *Mo. Pac. R. Co. v. Norwood*, 283 U. S. 247, 75 L. Ed. 1010, where the Court said (Page 254):

> "The burden is on the plaintiff by candid and direct allegations to set forth in its complaint facts sufficient plainly to show the asserted invalidity". (Citing cases).

As we have said, there is nothing in the pleadings suggesting it, nor was it mentioned in argument or otherwise. So far as the appellant is concerned, they are compelled to meet this issue raised for the first time in the brief of the Appellees in the Supreme Court of the United States. The Appellant has had no chance to develop this issue. Even if it should be assumed as to the wife, the Act could have no application, the Court would then be confronted with the question as to whether or not the Act is severable.

Moreover, all of this is aside from the consideration that the unconstitutional application of the Act, not as it might apply to others, but as it applies to the complaining party, is before the Court in a given case.

We refrain from going into these questions in the confident belief that Appellees are attempting to present another case which is not before this Court and to espouse causes not their own and attempting this for the first time in their brief before the Supreme Court of the United States. The manifest injustice of calling upon the Appellant to confront that issue under these circumstances is clear.

UNIFORMITY.

The Succession complains that Section 8 of Article 1 of the United States Constitution is violated in that there is no geographic uniformity in the application of this late provision relating to inclusion of community property. The point is made that there are only eight community states and that the statute will bear onerously on those eight states and leave forty others unaffected. However, the community system is one which the State of Louisiana is at liberty to have or not to have. If the Federal Statutes were made to depend upon the state statutes, this would operate as a restriction on the Federal Government and a denial of the declaration in the Federal Constitution that the Constitution, Laws and Treaties of the United States are the supreme law of the land *(Article VI, U. S. Constitution)*.

This issue, in another form, was presented to the United States Supreme Court in the case of *State of Florida v. Mellon*, 273 U. S. 11, 71 L. Ed. 511. The State of Florida had no inheritance tax for the obvious reason that its absence would attract aging, monied people to take up residence in that state (it being a public policy of Florida not to have an inheritance tax as it is the public policy of Louisiana to have a community property system). Florida sought to enjoin the provision of the Federal Revenue Act of 1926, Sec. 301 (b) providing for a credit of 80% in the payment of the Federal Estate Tax, of all inheritance and legacy taxes paid by a decedent's succession to the various states. The discrimination Florida urged was that thus, in the payment of their Federal Estate Taxes, citizens of all the states having an inheritance tax enjoyed a credit

against their Federal Estate Tax not enjoyed by the citizens of Florida and it therefore urged the lack of geographic uniformity as is urged here, but the Court struck this down in the following language which is appropriate here:

> "The contention that the federal tax is not uniform because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax. All that the Constitution (art. 1, sec. 8, cl. 1) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States."

A tax is uniform, within the meaning of this constitutional provision on that subject, when it operates with the same effect in all places where the subject is found; and it is not wanting in such uniformity because the thing taxed is not equally distributed in all parts of the United States.

Edye v. Robertson (Head money cases), *112 U. S. 580, 28 L. Ed. 798;*
Pollock v. Farmers' Loan & T. Co., 157 U. S. 593, 39 L. Ed. 823;
Pollock v. Farmers' Loan & T. Co., 158 U. S. 683, 39 L. Ed. 1145;
Knowlton v. Moore, 178 U. S. 86, 44 L. Ed. 987;
Downes v. Bidwell, 182 U. S. 452, 45 L. Ed. 1131;
Patton v. Brady, 184 U. S. 622, 46 L. Ed. 720.
Phillips v. Commissioner of Internal Revenue, 283 U. S. 588, 75 L. Ed. 1289.

But counsel says that the community in Louisiana is a kind of co-tenancy. There is, of course, an analogy to a co-tenancy as there is an analogy to a partnership, but the distinction is so obvious as to allow Congress in its discretion to make one taxable and the other not. There must be a margin allowed for the play of legislative judgment. *Burnet v. Wells*, 289 U. S. 669, 77 L. Ed. 1439.

Respectfully submitted.

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